JD(NY)-01-21
Newark, NJ

**UNITED STATES OF AMERICA**
**BEFORE THE NATIONAL LABOR RELATIONS BOARD**
**DIVISION OF JUDGES**

**NEW CONCEPTS FOR LIVING, INC.**

**Respondent**

**and** **Cases: 22–CA–187407**
**22–CA–195819**
**COMMUNICATIONS WORKERS LOCAL 1040** **22–CA–197088**
**22–CA–205843**
**Charging Party** **22–CA–208390**

*Nancy Slahetka, Esq.,*
for the General Counsel.
*Brent W. Yessin, Esq. and James J. Cusack, Esq.,*
for Respondent.
*Annmarie Pinarski, Esq. and William Schimmel, Esq.,*
*f*or the Charging Party

## DECISION

## STATEMENT OF THE CASE

JEFFREY P. GARDNER, Administrative Law Judge. This case was tried in Newark, New Jersey beginning September 26, 2018 and ending November 20, 2018, during which all parties were afforded the opportunity to present their evidence. The consolidated complaint (GC Exh. 1(t))[1] alleges that Respondent violated Section 8(a)(1) of the Act by: (1) encouraging support for the filing of a decertification petition; (2) soliciting employees to resign their union membership and withdraw authorization for dues deduction; (3) informing employees that it would be futile for them to select the Union as their collective bargaining representative; and (4) unlawfully seeking information in a memo to employees about their support for the Union.

The complaint also alleges that Respondent violated Section 8(a)(5) and (1) of the Act by refusing to provide requested financial information during bargaining, and by engaging in an array of that and other conduct during contract bargaining that taken together amounted to overall bad faith bargaining.

In addition, the complaint alleges Respondent further violated Section 8(a)(1) by conducting an unlawful *Struksnes* poll to determine whether employees wanted the Union to be their exclusive collective-bargaining representative. And finally, the complaint alleges that Respondent violated Section 8(a)(5) and (1) of the Act by withdrawing its recognition of the

[1] Abbreviations used in this decision are as follows: "Tr." for the Transcript, "Br." for party briefs, "GC Exh." for the General Counsel's exhibits, "CP Exh." for the Charging Party's exhibits, and "R. Exh." for Respondent's Exhibits. Specific citations to the transcript and exhibits are included only where appropriate to aid review and are not necessarily exclusive or exhaustive.

Union as the exclusive collective-bargaining representative of the unit on the basis of that *Struksnes* poll.

Respondent denied the essential allegations in the complaint. (GC Exh. 1(v).) After the trial, the parties filed briefs, which I have read and considered.[2] Based on those briefs and the entire record, including the testimony of the witnesses and my observation of their demeanor, I make the following

## FINDINGS OF FACT

### I. JURISDICTION

At all material times, Respondent has been a corporation engaged in the provision of services to the disabled, including transportation, vocational, housing and other services, as well as providing residential (or "group") homes for mentally disabled individuals in various northern New Jersey communities. It also operates a day center in Rochelle Park, NJ where it maintains its administrative offices.

During a representative 12-month period, Respondent derived gross revenue in excess of $250,000 and it purchased and received at its various New Jersey facilities goods and supplies valued in excess of $5,000 directly from suppliers located outside the State of New Jersey. Accordingly, I find, as Respondent admits, that it is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

I also find that the Union, which has been certified to represent a unit of Respondent's employees for many years and was long recognized and bargained with by Respondent as the unit's collective bargaining representative, is a labor organization within the meaning of Section 2(5) of the Act.

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[2] The General Counsel and Respondent each filed timely briefs on Friday, March 1, 2019, and the Charging Party subsequently joined in the General Counsel's brief. On Saturday, March 2, 2019, Respondent filed a Motion, opposed by the General Counsel and Charging Party, to accept a "supplemental" brief, which was filed in the early a.m. that same day, and which was effectively a substitute version of Respondent's brief, adding missing citations and finishing certain arguments it had already raised. It is not apparent that the "supplemental" brief took any advantage of having the benefit of General Counsel's brief in hand, and Respondent's counsel's affidavit specifically states he had not read it. As I do not perceive any undue prejudice in accepting the late-filed "supplemental" brief, I grant Respondent's Motion and have read and considered the disputed brief.

Following the submission of briefs, Respondent filed a Motion, opposed by the General Counsel and Charging Party, to re-open the record, reconsider admission of two exhibits and strike allegedly perjurious testimony. For the reasons stated on the record during the hearing, and absent any new evidence to suggest the exhibits were improperly admitted or that the witness had given perjurious testimony, Respondent's Motion is denied.

Thereafter, Respondent filed three additional submissions of "supplemental authority" for my consideration, identifying Board decisions issued after post-trial briefs were filed, to which the General Counsel replied. As in every case, this decision relies on applicable Board law.

## II. ALLEGED UNFAIR LABOR PRACTICES

## THE FACTS

### *Background*

Respondent is a non-profit corporation which receives the entirety of its funding from state medicaid grants to provide services to developmentally disabled adults. Its approximately 90 full-time and part-time employees, including drivers, direct care counselors, day program counselors, residential counselors, maintenance staff and secretary/receptionists have been represented by the Union, Communications Workers of America, Local 1040, for purposes of collective bargaining since at least 2007.

Respondent's Chief Executive Officer since January 2016 has been Steve Setteducati, who testified at the hearing. Other members of its bargaining committee included Associate Executive Director Adam Fishman, Human Resources Manager Janice Hoyda, and Human Resources Assistant Cheryl O'Reilly, all of whom testified at the hearing as well.

Also testifying on behalf of Respondent were attorney James Cusack, who took over as lead negotiator for Respondent's prior counsel George Corliss,[3] Retired Superior Court Judge Joseph Scancarella and employee Lorna Williamson, who participated in the disputed poll at issue, as well as employees ShellyAnn Burke, Andre Marshall, Andrew Pickett and Summer Ivy among others.[4]

The most recent collective bargaining agreement between the parties went into effect December 1, 2007 and expired on November 30, 2011. That CBA was extended to June 30, 2014 by memorandum of agreement between the parties, but no additional extensions or agreements have been executed since the expiration of that extenstion.

The Union's President at all material times has been Carolyn Wade, who testified at the hearing, as did local and international Union officials who participated in bargaining, Robert Yeager, Donna Ingram, Ruth Barrett, and employees Bryan Baldicanas and Saeed Martin. Union attorney Annemarie Pinarski also testified for the Union.

### *The Period Following CBA Expiration and Initial Bargaining*

Upon the June 2014 expiration of the parties' CBA, the Union's appointed representative at the time did not request to negotiate a successor agreement nor apparently otherwise actively service the unit, and in December 2014, she tragically passed away in an auto accident. The Union's appointed replacement in December 2014 also appears not to have pursued contract bargaining or otherwise to have actively serviced the unit, and subsequently retired in the Fall of 2015.

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[3] Corliss did not testify at the hearing.

[4] Respondent was permitted to call five additional employee witnesses – Tara Earl, Angieanna Gayle, Tracey Ogletree, Diesha Washington, Pilar Smith and Tristin Allen - who testified about the Respondent-conducted election, the earlier decertification petition, and some of their interactions with the Union. Respondent had offered to provide similar testimony from dozens of other employees, many of whom were present outside the hearing room, but I denied that request, finding the offered testimony would have been unnecessarily duplicative.

At that point, the Union designated Ingram as the representative to service the unit, and Ingram acknowledged that by this time, the Union's members were dissatisfied with the previous representative's enforcement of the contract and complete lack of communication with them. She was tasked with reaching out to members and trying to rebuild the Union's fractured relationship with its members. It is not disputed that from June 2014 until at least April 2016, the Union did not formally request to bargain for a successor contract.

Following an initial exchange of correspondence in June and July 2016 seeking to locate the parties' prior contracts and schedule a date to begin negotiations, by letter dated August 24, 2016 from Yeager to Setteducati, the Union sent a list of contract proposals and proposed location for the parties' initial negotiation meeting. That meeting took place on August 30, 2016, and was attended by Yeager and Ingram on behalf of the Union, and by Fishman, Hoyda and Corliss on behalf of Respondent. It lasted about 2 hours, with the parties first reviewing the Union's proposals, and then Respondent providing its own written proposals. The parties agreed to meet again on September 28, 2016.

Prior to that second meeting, the Union sent Respondent a letter with its written responses to Respondent's proposals. The same representatives for the Union and Respondent were present for the parties' second meeting. This meeting lasted a bit more than two hours during which the parties went through the Union's responses which had been earlier provided.

By the end of this meeting, the parties had reached tentative agreement on a number of proposals from each side, but there remained many outstanding items, and no final agreement was reached as to any particular item. No additional proposals were made by either party at that meeting, and they agreed to meet again on October 25, 2016.

### *The Decertification Petition and the October 18, 2016 Meetings in River Vale with Setteducati*

Well before October 2016,[5] a decertification petition was being circulated among employees, initially by an employee named "Nester" who later approached employee Andre Marshall, a fellow direct care counselor, and asked if he would be willing to take that over. Marshall had already been discussing his disaffection with the Union with a co-worker named "Jacob," and after thinking it over for a few days, he agreed to take over the lead for gathering employee signatures from Nester, who resigned from Respondent shortly thereafter.

Marshall was assisted in gathering signatures by Jacob and another co-worker, ShellyAnn Burke. They visited multiple of Respondent's houses to gather signatures, with some employees agreeing to sign and some not. Marshall brought signatures to the NLRB's Regional office on multiple occasions prior to ultimately filing the decertification petition.

Respondent was aware that the decertification effort was happening, as Marshall had been told by a supervisor that he was not allowed to talk about it while he was working. On October 18, 2016, Setteducati came to Respondent's group home in River Vale for a monthly staff meeting, which was attended by the entire River Vale staff, including Baldicanas, and lasted approximately 15 minutes. At the end of the meeting, Setteducati told the staff that there was a specific window of time to legally decertify a union. He also told the staff that he

[5] No specific start date to the decertification effort was identified, but based on the description of the efforts, it was an ongoing process of at least weeks.

wanted to give merit raises to those who worked harder than others, but that the Union would not let him give merit raises.

After that initial meeting, River Vale manager Williams called Setteducati on the phone and asked him to return to the facility to answer questions that Baldicanas had about the Union.[6] Later that same day, Setteducati returned to the River Vale group home and met with employees Baldicanas and Martin.

In this second meeting, Martin asked Setteducati why there was an urgency to get rid of the Union, and Setteducati stated "that would be up to you guys." Setteducati stated that he could answer questions, but that he could not lie to them, intimidate them or make any promises. He stated that the employees had not had a contract in three years, and he expressed his opinion that he would be asking himself why the Union let that happen.

Setteducati then repeated that there was a specific window of time for decertifying a union and that it was closing. He told them that negotiations for a new contract were about to start, and once that happened, they would not be able to get rid of the Union. Specifically, he said that if the employees chose to keep the Union, Respondent would have to keep negotiating, but if the employees chose to get rid of the Union, they would be gone for at least a year, at which point the employees could vote to bring the Union back.

He asked them why they would want to keep the Union, stating that the Union had not done anything about multiple employees who had been terminated and noting that the contract had long ago expired and the Union had not done anything about it. Setteducati told them the Union was just taking money out of their paychecks, and all they had ever done in ten years was get employees a 50-cent raise.

On October 20, 2016, Marshall filed the decertification petition. Thereafter, and before the third scheduled bargaining session took place, by email dated October 21, 2016, Corliss advised the Union bargaining committee that a decertification petition had been filed by a bargaining unit member, apparently supported by a majority of unit employees. Corliss stated that the filing of that decertification petition created a good faith doubt as to whether the Union represented a majority of the unit, and therefore, Respondent was suspending bargaining pending the Region's action on the petition.

A decertification election was initially scheduled for November 15, 2016. However, on October 31 the Union filed the first of the within unfair labor practice charges, alleging Respondent had unlawfully assisted with the decertification petition. That charge blocked further processing of the petition and postponed the NLRB election indefinitely. The petition was withdrawn shortly thereafter, and the Regional Director approved the withdrawal by Order dated December 1, 2016, though the charge remains.

[6] Baldicanas recorded one side of this phone call between Williams and Setteducati while standing in or about the doorway to Williams' office. That recording was the subject of a Motion to Strike which I denied on the record. After post-trial briefs had been submitted, Respondent renewed its Motion to Strike, which I am now denying for the reasons stated during the hearing, and specifically because I find that Baldicanas was within his rights to make the recording.

### *The Union's Unsuccessful Attempt to Revive Employee Support*

After the decertification petition was withdrawn, the Union began a determined effort to try to revive support among the unit employees, which included mailings, visits to the employee facilities, and attempts to visit members' homes. However, those efforts were mostly unsuccessful.

Indeed, Ingram acknowledged that the Union's reception by employees was not positive. The Union was turned away by employees on multiple occasions both at employee facilities and from the employees' individual residences.[7] When the Union held a meeting in December 2016 ahead of anticipated further bargaining, it was sparsely attended.

On December 28, 2016, Respondent distributed a memorandum with a member resignation/dues revocation form which over 90% of employees signed. A few days later, it forwarded the completed forms it received to the Union by fax.

Ingram, who took part in leading the ongoing effort to try to revive employee support, was reluctant to state how many employees the Union was able to garner support from. Ultimately, during the entire time from December 2016 to September 2017 when the non-Board election was conducted, out of approximately 85 eligible employees, Ingram estimated that she "may have had maybe" gathered as many as 30-40 authorization cards, but acknowledged she was only speculating, and that some of those were likely duplicates. I find the real number was likely lower.

During this period, the Union was declining to collect dues from the members. But in fact, only a handful of employees had actually authorized dues to be deducted, with nearly every employee having already requested in writing that the Employer cease deducting dues from their paychecks.

### *Respondent Changes its Bargaining Counsel*

At the next bargaining session following the withdrawal of the decertification petition, on January 12, 2017, and thereafter, Respondent replaced its lead negotiator with attorney James Cusack, and the Union replaced its lead negotiator with attorney Annmarie Pinarski.[8] This session, and the remainder of the parties bargaining sessions, nine in total, took place in the conference room of Respondent's Rochelle Park, NJ facility.

Over the Union's initial objection, Cusack insisted that the parties review the expired contract article by article, notwithstanding the tentative agreements reached earlier in the first two bargaining sessions, which the Union reluctantly agreed to do. On a number of occasions, Cusack also insisted that he be able to conduct bargaining remotely over Skype, which the Union also reluctantly agreed to do.

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[7] The decertification petitioner filed a charge against the Union alleging it was intimidating and coercing employees and using harassing, racially offensive and threatening language to create an atmosphere of fear and intimidation. However, the charge was dismissed when the individual charging party declined to cooperate with the investigation.

[8] Cusack had been retained following the filing of the decertification petition and spoke with the petitioner prior to the petition being withdrawn. By email on December 2, 2016, Corliss notified the Union that he no longer represented Respondent.

The parties continued negotiating through much of that year, albeit sporadically, with bargaining sessions taking place on January 12 and 13, February 1, March 7, June 16, July 18 and August 29, 2017. It is undisputed that it was Respondent who was pushing for negotiations to move faster, requesting that the parties meet twice per week, and complaining that the Union cancelled some scheduled sessions. When Respondent counsel Pinarski was confronted with these facts, her response was that two days a week was very difficult for the Union due to their schedules.

The parties never reached agreement on a new contract, and it is undisputed that the parties never reached an impasse either.

### *The Disputed Information Request*

In response to statements Cusack made during the January 2017 bargaining sessions that Respondent had "financial problems," that things were "not good," and that there was no money available for wage increases, the Union made a written request for Respondent's financial records on February 1, 2017. It is undisputed that Cusack had repeatedly emphasized that it was not the company's position that it can't pay the Union's proposed wage increases but that it won't agree to pay them.

### *Respondent Polls its Employees*

On September 7, 2017, Respondent notified the Union of its intention to conduct a poll of its employees' support for the Union on September 21, 2017. Respondent asserted that it had a good faith doubt of the Union's majority status based on multiple factors: (1) a lack of participation by unit employees at bargaining sessions; (2) the fact that 98% of unit employees had elected to cease paying Union dues; (3) the fact that no employees responded to its offer to resume deducting Union dues; and (4) the claim that the 2016 decertification petition had been supported by roughly half of the unit employees.

The poll purported to be conducted in accordance with NLRB procedures for a Board election. Respondent provided the Union with an *Excelsior*-type list via email, with the names of eligible employees. Respondent arranged for a retired New Jersey Superior Court Judge, Joseph Scancarella, to preside over the poll, and offered the Union the opportunity to have an observer present, which the Union declined.

The election took place in the conference room of Respondent's Rochelle Park facility on September 21, 2017, the same day Respondent was conducting a mandatory agency-wide training at that location. By all accounts, the poll was designed to mimic an NLRB election, though the Board was not involved in any way in the conduct of the election. The Union declined to participate in any respect and advised Respondent that it believed the poll to be unlawful.

Of the approximately 85 eligible employees, the outcome of the poll was 61 to 9 against being represented by the Union.

### *Respondent Withdraws Recognition*

On October 5, 2017, Respondent notified the Union in a letter from Cusack that it was withdrawing recognition. In his letter, Cusack reiterated that Respondent had a good faith doubt of the Union's majority status as early as 2016 when the decertification petition was

filed, that 95% of the members had left the Union, that after Respondent sent out a voluntary dues checkoff card to employees in August, not a single card was returned to Respondent, and that the Union did not have employees at its bargaining sessions. Finally, Cusack asserted that the decision to withdraw recognition was based on the results of the election.

***Credibility***

My factual findings set forth above are based on my observations of witnesses' testimonial demeanor.[9] I found employee Bryan Baldicanas to be less than credible. He was at times evasive, and repeatedly looked to counsel table when difficult questions were posed. Though I do not believe he made any intentionally false statements, he did appear to be unusually cautious in his testimony, particularly for a former employee.

I also found Union witness Robert Yeager to be similarly less than credible in his testimony. He was very defensive when challenged on cross examination, and seemed evasive, straining to support the litigation position of the Union. This was in contrast with witness Donna Ingram, who I found to be a credible witness, and whose testimony did not seem to be affected by the Union's desire to preserve a particular narrative.

The other Union lay witnesses, Wade, Barrett and Martin, were all mostly credible in their testimony, as was that of attorney Pinarski, who testified very matter-of-fact in support of the Union's positions.

I found Respondent's witnesses Setteducati, Fishman, Hoyda and O'Reilly to have testified credibly. In particular, I found Setteducati to have been straightforward in answering questions without regard for any particular agenda. He did not present as overly prepared, but rather, was clear and unevasive in his testimony. The other Respondent witnesses struck me as similarly straightforward.

I found Respondent attorney Cusack to be more rehearsed in his testimony than Respondent's lay witnesses, but no less credible in testifying honestly about his role in bargaining and what took place during and between bargaining sessions. In particular, his candor regarding the motivations for Respondent's bargaining positions consistently rang true.

I found the two management witnesses who conducted the polling, Judge Scancarella and observer Lorna Williams, both to be credible. They responded directly to questions from counsel on direct and cross-examination, and appeared intent on telling the truth regardless of how it might affect the case. Their testimony was consistent and appeared forthright.

I additionally note that Respondent witnesses Cusack and O'Reilly, who were also present at the voting area prior to the polling, were very credible in their description of the polling setup, which was corroborated by the multiple individual employee witnesses. Although those employee witnesses to the polling had less than perfect recollection of the day's events, their testimony was mostly uncontradicted, and they recounted mutually

[9] Where credibility resolution is not based on observations of witnesses' testimonial demeanor, the choice between conflicting testimonies rests on the weight of the evidence, established or admitted facts, inherent probabilities, and reasonable inferences drawn from the record as a whole. *Taylor Motors, Inc.*, 366 NLRB No. 69 slip op. 1 at fn. 3 (2018); *Lignotock Corp.*, 298 NLRB 209, 209 fn. 1 (1990).

consistent specific details which I found to be credible, including about the setup of the room, the process used to conduct the voting, and the assurances of privacy that were provided.

## ANALYSIS

### A. The Section 8(a)(1) Allegations

1. Respondent did not unlawfully provide support for the filing of a decertification petition

The General Counsel alleges that Respondent violated Section 8(a)(1) of the Act by encouraging and soliciting employee support for the filing of the October 2017 decertification petition. I do not find that the evidence presented supports this allegation.

As the General Counsel correctly notes, an employer violates the Act by "actively soliciting, encouraging, promoting or providing assistance in the initiation, signing, or filing of an employee petition to decertify the bargaining representative." *Mickey's Linen & Towel Supply, Inc.*, 349 NLRB 790, 791 (2007).

An employer is not entirely barred from providing any assistance to employees relating to a decertification petition. The question for the Board in determining whether an employer's assistance is unlawful rests in deciding whether the employer's conduct constitutes more than ministerial aid. *Times-Herald, Inc.*, 253 NLRB 524 (1980).

For example, an employer may not solicit its employees to circulate or sign a decertification petition. *Armored Transport, Inc.* 339 NLRB 374, 377 (2003); see also *General Die Casters, Inc.*, 359 NLRB 89, 135 (2012). Indeed, an employer may neither instigate nor facilitate a decertification petition, as employees retain the sole right to decide whether to decertify their union. Harding Glass Co., 316 NLRB 985 (1995).

The General Counsel's sole allegation that Respondent unlawfully provided support for the filing of the petition rests on Setteducati's having made two visits to the River Vale group home on October 18, 2018, just prior to the filing of the decertification petition, which the General Counsel maintains constituted more than ministerial support of the petition, the second of those visits coming at the reported request of an employee with questions.

But, that conclusion ignores the unrebutted testimony of the petitioner Marshall, that efforts to gather support for the petition had been in the works for weeks or longer, and that he had delivered signatures to the Region on more than one previous occasion trying to file the petition. Moreover, while Setteducati did address employee questions about the decertification petition, even the General Counsel concedes it is not unlawful for an employer to respond to such questions.

At no time did Setteducati tell employees they should decertify the Union, nor did he suggest that Respondent would stand in the way of their keeping the Union. Indeed, Setteducati emphasized that the choice was solely that of the employees, that Respondent was then bargaining with the Union, and would continue to do so. There was also no evidence that any employee signatures were elicited from that one location in support of the decertification petition following Setteducati's appearance there.

As such, to the extent that Respondent provided any aid in support of the filing of the October 2017 decertification petition by his statements, I find that it was no more than the ministerial assistance permitted under the Act. Accordingly, I will recommend that this allegation be dismissed.

2. Respondent did not unlawfully solicit employees to resign their union membership and withdraw authorization for dues deduction

The General Counsel alleges that Respondent's distribution of a memorandum on December 28, 2016 with a member resignation/dues revocation form was coercive and an unlawful poll of employees' support for the Union. Respondent does not dispute that it distributed the memorandum and form, and that it collected them back from employees for payroll purposes. It also forwarded the completed forms to the Union.

Here, although the complaint had alleged two supervisory employees by name had solicited employees to sign the withdrawal forms, neither of these individuals was called to testify, nor was any evidence elicited to advance the theory that they engaged in this alleged solicitation, though that allegation was never withdrawn. Rather, the General Counsel merely argues that distributing the forms was coercive, and collecting the forms (from over 90% of employees in less than a week) constituted an unlawful poll which it later relied on in part for its good faith doubt of the Union's majority support.

Significantly, in *Valley Hospital Medical Center, Inc.*, 368 NLRB No. 139 (2019), the Board held that an employer's obligation to check off union dues ends when its collective-bargaining agreement containing a checkoff provision expires, reinstating what for many years prior to the decision in *Lincoln Lutheran of Racine*, 362 NLRB 1655 (2015) had been longstanding Board law under *Bethlehem Steel*, 136 NLRB 1500 (1962), remanded on other grounds sub nom *Marine & Shipbuilding Workers v. NLRB*, 320 F.2d 615 (3d Cir. 1963), cert. denied 375 U.S. 984 (1964). The application of the *Valley Hospital* decision was explicitly made retroactive.

As such, at the time it distributed the memorandum to employees, Respondent was actually privileged to cease deducting dues altogether across the Board. It makes no sense that affording employees who so chose to continue having their dues deducted. And despite the General Counsel's assertion that Respondent maintained a list of those who had withdrawn and those who had not for purposes beyond payroll administration, there was no evidence to support this assertion.

Accordingly, I will recommend that this allegation be dismissed.

3. Respondent did not unlawfully seek information in a memo to employees about their support for the Union

The General Counsel also alleges that Respondent's distribution of the August 15, 2017 memorandum and authorization card was coercive and an unlawful poll of employees' support for the Union. However, like the December 28, 2016 memorandum, I do not find either to be the case.

Unlike its argument that the December 28, 2016 memorandum was unlawful for giving employees information on how to stop paying Union dues, the General Counsel alleges that Respondent's distribution of the August 15, 2017 memorandum was unlawful for giving

employees information on how to start paying Union dues. Again, Respondent does not dispute that it distributed the memorandum and form, and that it intended to collect them back from employees for payroll purposes but did not receive any.

Despite the General Counsel's assertion that Respondent intended to maintain a list of those who signed a card for purposes beyond payroll administration, there were actually no cards signed. And, I do not find that the language of the memorandum are coercive or tend to make employees feel peril in submitting or not submitting a card.

Accordingly, I will recommend that this allegation be dismissed.

4. Respondent did not inform employees that it would be futile for them to select the Union as their collective bargaining representative

The General Counsel further alleges that comments made by Setteducati in his September 12, 2017 and by an employer consultant at the September 13, 2017 mandatory staff meeting unlawfully conveyed the message to employees that it would be futile for them to select the Union as their collective bargaining representative.

As the General Counsel acknowledges, under Section 8(c) of the Act, an employer's expressions of its views, argument or opinion is not unlawful, unless the statements contain a threat of reprisal or force or promise of benefits. Indeed, an employer may criticize, disparage or denigrate a union without running afoul of Section 8(a)(1), provided that its expression of opinion does not threaten employees or otherwise interfere with the Section 7 rights of employees. *Children's Center for Behavioral Development*, 347 NLRB 35 (2006).

I find the language of the September 12, 2017 Setteducati letter to be non-coercive expressions of his views about unionization and run of the mill opinions that are lawful under the Act. Similarly, I find the statements attributed to Respondent's consultant to be primarily rooted in fact, and further non-coercive expressions of Respondent's views.

Nothing in either communication contained any threat of reprisals against employees, nor any promise of benefits. Nothing about the language to which the General Counsel objects strikes me as informing employees that it would be futile for them to select the Union as their collective bargaining representative.

Accordingly, I will recommend that this allegation be dismissed.

## B. The Alleged Section 8(a)(5) and (1) Violations

The General Counsel alleges that Respondent engaged in an array of conduct during contract bargaining that taken together amounted to overall bad faith bargain, including refusing to provide requested financial information during bargaining, which it alleges as an independent 8(a)(5) allegation as well.

In determining whether a party has engaged in bad faith bargaining, the Board considers the totality of the party's conduct, both at and away from the bargaining table. *Public Service Co. of Oklahoma*, 334 NLRB 487 (2001), enfd. 318 F.3d 1173 (10th Cir. 2003); *Overnite Transportation Co.*, 296 NLRB 669 (1989), enfd. 938 F.2d 815 (7th Cir. 1991).

The Board considers many factors, including the party's bargaining demands, unilateral changes, withdrawal of already-agreed-upon provisions without sufficient explanation, failure to provide relevant information, and unlawful conduct away from the bargaining table. *Mid-Continent Concrete* 336 NLRB 258 (2001), enfd. 308 F.3d 859 (8th Cir. 2002). It can also include a party's refusing to budge from an initial bargaining position, refusals to offer genuine explanations for bargaining proposals, and refusals to make efforts at compromise. *Id.* at 260.

Here, the General Counsel relies on what it terms were Respondent's regressive bargaining proposals as evidence of bad faith, including: (1) a proposal for a wage freeze and a wage reopener; (2) a proposal to remove dues checkoff and union shop; and (3) a proposal to remove or alter arbitration from the contract. It further claims that Respondent's offer to reconsider union shop if the Union agreed to a poll and Respondent's removal of employees' addresses from the monthly list of unit members were both evidence of bad faith.

I find that what the General Counsel labels as regressive bargaining proposals were no more than hard bargaining on the part of an employer who knew it had the upper hand at the bargaining table. The wage freeze and reopener proposal, for example, came after its initial proposal for merit pay was dismissed out-of-hand by the Union.

Similarly, the union shop and checkoff proposals, while clearly anathema to the Union, were within Respondents rights to make, and were accompanied by an explanation as to why Respondent was resistant to those provisions. I find the fact that Respondent proposed agreeing to union shop if the Union agreed to a poll of its members, rather than being evidence of bad faith, was evidence of the genuine nature of its explanation as to why it was so resistant to a union shop.

As for Respondent's proposal to remove arbitration from the contract, I agree with the assertion that arbitration is among the most powerful tools in a collective bargaining agreement, when it is negotiated. But, an employer is not required to agree to accept any particular contract term, and it is not clear from the evidence that the parties had reached a firm agreement on an arbitration clause earlier in bargaining. And providing employees' addresses in a list of unit members is similarly neither required of employers, nor was it clear from the evidence that Respondent had always previously done so in this case.

In addition to these bargaining positions and other conduct, the General Counsel further relies on Respondent's alleged unlawful support of the decertification petition, its alleged unlawful distribution of the memoranda/correspondence of December 2016, August 2017 and September 2017, each of which were alleged as an unfair labor practices already discussed above, and its alleged unlawful refusal to provide financial information.

With regard to the requested financial information, the General Counsel recognizes that its allegation rests on a finding that Respondent was claiming an inability to pay the Union's bargaining demands. Information regarding an employer's finances is not presumptively relevant, and only becomes relevant when an employer claims that inability to pay. *NLRB v. Truitt Mfg. Co.* 351 U.S. 149 (1956).

The testimony of both Respondent and Union bargaining members present at negotiations consistently echoed Cusack's position that although money was tight, Respondent's proposals were not based on an inability to pay, but rather, merely that they

would not pay and did not want to pay what the Union was seeking. The Union's own bargaining notes confirmed that Cusack consistently took this position.

Moreover, Respondent did provide 3 years of Form 990s containing the bulk of financial information which the Union maintained it was seeking, yet the Union acknowledged that it had not reviewed that information, calling into question whether the Union even believed it needed that financial information.

Because I Respondent's alleged bargaining violations to have been no more than hard bargaining on the part of Respondent, that Respondent was not obliged to provide the requested financial information beyond what it had already provided to the Union, and that the other alleged conduct on the part of Respondent did not violate the Act, I find that the totality of Respondent's conduct does not support a finding of bad faith bargaining in violation of Section 8(a)(5) of the Act.

Accordingly, I will recommend that these allegations be dismissed.

### C. The *Struksnes* Poll

The complaint further alleges Respondent violated Section 8(a)(1) by conducting its September 21, 2017 poll of employees to determine whether employees wanted the Union to be their exclusive collective-bargaining representative, which the General Counsel maintains was unlawful under *Struksnes Constr. Co.*, 165 NLRB 1062 (1967).

Absent unusual circumstances, the polling of employees by an employer will be violative of Section 8(a)(1) of the Act. As the Board in *Struksnes* noted, "any attempt by an employer to ascertain employee views and sympathies regarding unionism generally tends to cause fear of reprisal and, therefore, tends to impinge on section 7 rights." *Id*. at 1063.

However, where an employer has good-faith doubts regarding a union's claim of majority status, the employer may lawfully poll its employees about their support for the union if certain safeguards are enacted.

In *Struksnes*, the Board held that in order for the polling of employees to be lawful, the following safeguards must be observed:

> (1) the purpose of the poll is to determine the truth of a union's claims of majority;
> (2) this purpose is communicated to the employees;
> (3) assurances against reprisals are given;
> (4) the employees are polled by secret ballot, and
> (5) the employer has not engaged in unfair labor practices or otherwise created a coercive atmosphere.

*Struksnes*, 165 NLRB at 1063.

The non-observance of these safeguards renders a poll of employees' union sympathies violative of 8(a)(1) of the Act. Note that "it is Respondent's burden to establish the

affirmative defense that, against a background free from other coercion" it met all of the *Struksnes* elements. *Burns International Security Services*, 225 NLRB 271, 275-276 (1976).[10]

This is the unusual case where Respondent was lawfully able to poll its employees. First, it clearly had a good faith doubt as to the Union's majority status. As Respondent asserted in its September 7, 2017 letter to the Union announcing the poll, that good faith doubt had multiple bases, specifically: (1) the lack of unit members attending bargaining sessions; (2) the fact that 98% of the unit had withdrawn authorization for dues checkoff over 8 months earlier; (3) not a single employee requested dues to be deducted in response to Respondent's specific offer to begin doing so a month earlier; and (4) the decertification petition that was filed almost a year earlier.

None of these items would support an employer's withdrawal of recognition, individually or even taken together. Unit members are not required to attend bargaining sessions, withdrawal of dues checkoff authorization is not the same as no longer wishing to be represented,[11] employees are not required to submit authorization cards directly to their employer, and a showing of interest in support of a decertification petition is not evidence that a union has in fact lost majority support. However, I do find that taken together in the context of this case, these items did support a good-faith doubt on the part of Respondent sufficient to allow it to conduct a lawful poll.

As for the poll itself, it is clear that, though not perfect, Respondent attempted to follow the Board's gold-standard procedure for a valid election, mimicking the Board's Excelsior list, the Board's Election Notice, the setup of the voting place, the presence of observers, a private place to mark ballots, and a secure ballot box.

More importantly, the election adequately met each of the safeguards delineated in *Struksnes*. The purpose of the poll was plainly to determine whether the Union had the support of the majority of unit employees, and both the Union and the employees were made aware of that. Employees were told they were not required to vote, that their votes were secret, and that Respondent would honor the employees' wishes. The polling was in fact done by secret ballot, and I have not found that Respondent had engaged in unfair labor practices or otherwise created a coercive atmosphere.

Accordingly, I find the September 21, 2017 poll of employees, which had 82% turnout of eligible voters, and in which 87% of employees voted against being represented by the Union was lawful.

### D. The Withdrawal of Recognition

The General Counsel alleges that Respondent violated Section 8(a)(5) and (1) of the Act by withdrawing its recognition of the Union as the exclusive collective-bargaining representative of the unit on the basis of the *Struksnes* poll. On this point, the thrust of the General Counsel's argument is that because, they argue, the poll was unlawful, Respondent

[10] Enforcement denied, on other grounds, in *Burns Intern. Security Services, Inc. v. N.L.R.B.* (10th Cir. 1977).

[11] *In Kauai Veterans Express Co.*, 369 NLRB NO. 59 (2020), the Board specifically held that an employer's reliance on a petition to revoke union membership as evidence of a loss of majority support was unlawful, because membership and representation are not the same.

was not privileged to rely on its outcome as evidence of the Union's lack of majority support, and therefore, could not lawfully withdraw recognition.

An incumbent union enjoys a continuing presumption of majority status, even after the expiration of a collective bargaining agreement, and an employer is privileged to withdraw recognition from an incumbent union only on a showing with objective evidence that the union has in fact lost the support of a majority of unit employees. *Levitz*, 333 NLRB 717 (2001). That supporting evidence must not be tainted by an unfair labor practice.

In *Master Slack Corp.*, 271 NLRB 78 (1984), the Board set forth criteria for determining whether evidence of loss of support may have been tainted by an unfair labor practice, including the length of time between an unfair labor practice and the withdrawal of recognition; (2) the nature of the violation, including the possibility of a detrimental effect on employees; (3) the tendency to cause employee disaffection; and (4) the effect of the unlawful conduct on employees' morale. *Id.* at 84.

Here, the General Counsel argues that Respondent caused the employee disaffection in this case, based on the various unfair labor practices which the General Counsel has alleged, and therefore, the evidence of loss of majority status should be rejected. Notwithstanding that I have not found Respondent to have violated the Act in any of the manner alleged, the General Counsel's position ignores the fundamental truth underlying this case, that it was the Union's own absence over the span of multiple years that ultimately led to its loss of support.

Moreover, as I have found Respondent's September 2017 poll to have been lawful, and in light of the clear expression of employee sentiment demonstrated by the outcome of that secret ballot poll, I find that Respondent was within its rights to withdraw recognition of the Union. Indeed, to continue recognizing the Union as its employees' representative would fly in the face of the Act's intention to allow employees to determine whether to be represented and by whom.

Accordingly, I will recommend that this allegation be dismissed.

## Conclusions of Law

1. New Concepts for Living is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. Communications Workers Local 1040 is a labor organization within the meaning of Section 2(5) of the Act.

3. New Concepts for Living has not violated the Act in any manner alleged in the amended complaint.

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended:[12]

[12] If no exceptions are filed as provided in Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Board's Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

**ORDER**

The amended complaint is dismissed.

Dated, Washington, D.C. January 8, 2021

Jeffrey Gardner
Administrative Law Judge